Supreme Court, U.S.
FILED
MAR 16 1999
OFFICE OF THE CLERK

No. 98-1326

In The

Supreme Court of the United States

October Term, 1998

RITA GLUZMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF SOUTHEASTERN LEGAL FOUNDATION, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

L. LYNN HOGUE*
General Counsel
VALLE SIMMS DUTCHER
Associate General Counsel
Southeastern Legal Foundation, Inc.
3340 Peachtree Road, N.E.
Suite 2515
Atlanta, GA 30326
(404) 365-8500

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 2

ARGUMENT 2

I. THIS COURT SHOULD REVIEW THE SECOND CIRCUIT'S RULING IN ORDER TO PROTECT IMPORTANT VALUES OF OUR FEDERALISM 2

A. The Second Circuit's Ruling Ignores The Limits Imposed On Congress's Commerce Clause Powers By Our Federalism 2

B. The Nationalization Of Criminal Law Matters More Properly Within State Authority Damages Our Federalism 5

C. Only Judicial Clarification Can Empower Lower Federal and State Courts To Effectively Police The Limits Of Our Federalism 7

II. THIS COURT SHOULD OVERRULE *CAMINETTI V. UNITED STATES* 13

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES:

Anisimov v. Lake, 982 F. Supp. 531 (N.D. Ill. 1997) 11

Bowers v. Hardwick, 478 U.S. 186 (1986) 16

Brzonkala v. Virginia Polytechnic Inst., 1999 U.S. App. LEXIS 3457, ___ F.3d ___ (4th Cir. 1999) (en banc) 10, 11

Caminetti v. United States, 242 U.S. 470 (1917) 2, 10, 13, 15

Cleveland v. United States, 329 U.S. 14 (1946) 14

Common Cause v. Schmitt, 455 U.S. 129 (1982) 1

Department of Commerce v. United States House of Representatives, ___ U.S. ___, 119 S. Ct. 765 (1999) 1

Doe v. Doe, 929 F. Supp. 608 (D. Conn. 1996) 10

Doe v. Hartz, 970 F. Supp. 1375 (N.D. Iowa 1997), rev'd on other grounds, 134 F.3d 1339 (8th Cir. 1998) 10

Federal Energy Regulatory Commission v. Mississippi, 456 U.S. 742 (1982) 1

Gregory v. Ashcroft, 501 U.S. 452 (1991) 3

Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) 8, 14, 15

Hoke v. United States, 227 U.S. 308 (1913) 13

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) 4

Powell v. State, 270 Ga. 327 (1998) 15

Seaton v. Seaton, 971 F. Supp. 1188 (E.D. Tenn. 1997) 11

TABLE OF AUTHORITIES – Continued

Page

Shapiro v. Thompson, 394 U.S. 618 (1969) 15

United States v. Bailey, 112 F.3d 758 (4th Cir.), cert. denied, 118 S. Ct. 240 (1997) 10

United States v. Bailey, 115 F.3d 1222 (5th Cir. 1997), cert. denied, 118 S. Ct. 866 .....10, 12

United States v. Beuckelaere, 91 F.3d 781 (6th Cir. 1996) 12

United States v. Bishop, 66 F.3d 569 (3d Cir.), reh'g en banc denied, 73 F.3d 23 (1995) 12

United States v. Kirk, 70 F.3d 791 (5th Cir. 1995), aff'd, 105 F.3d 997 (per curiam) (en banc), cert. denied, 118 S. Ct. 47 (1997) 12

United States v. Lopez, 514 U.S. 549 (1995) ..... *passim*

United States v. McHenry, 97 F.3d 125 (6th Cir. 1996), cert. denied, 117 S. Ct. 992 (1997) 12

United States v. Page, 136 F.3d 481 (6th Cir.), vacated and reh'g en banc granted, 143 F.3d 1049 (1998) 11

United States v. Rybar, 103 F.3d 273 (3d Cir. 1996), cert. denied, 118 S. Ct. 46 (1997) 12

United States v. Wall, 92 F.3d 1444 (6th Cir. 1996), cert. denied, 519 U.S. 1059 (1997) 12

United States v. Wilson, 73 F.3d 675 (7th Cir. 1995) 12

United States v. Wright, 965 F. Supp. 1307 (D. Neb.), rev'd, 128 F.3d 1274 (8th Cir. 1997), cert. denied, 118 S. Ct. 1376 (1998) 9, 10

Wickard v. Filburn, 317 U.S. 111 (1942) 15

Younger v. Harris, 401 U.S. 37 (1971) 4

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS:

U.S. Const. art. I, § 8, cl. 3 (the "Commerce Clause") ..... *passim*

STATUTES:

18 U.S.C. § 228 12

18 U.S.C. § 248 12

18 U.S.C. § 922(o) 11

18 U.S.C. § 1955 12

18 U.S.C. § 2119 12

18 U.S.C. § 2261(a)(1), (2), Violence Against Women Act of 1994 ("VAWA"), Pub.L. No. 103-322, §§ 40001-40703 ..... 5, 8, 10, 11

18 U.S.C.§ 2421 ..... 13, 16

42 U.S.C. § 13981(c) 10

O.C.G.A. § 16-6-2(a) 16

MISCELLANEOUS:

Chief Justice William H. Rehnquist, The 1998 Year-End Report of the Federal Judiciary 7

DOJ MANUAL § 9-79.000 (1997) 14

Graglia, *United States v. Lopez: Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719 (1996) 15

D. LANGUM, CROSSING OVER THE LINE: LEGISLATING MORALITY AND THE MANN ACT (1994) 14

TABLE OF AUTHORITIES – Continued

Page

Remarks of Chief Justice William H. Rehnquist, American Law Institute Annual Meeting, Mayflower Hotel, May 11, 1998 7

Task Force on the Federalization of Criminal Law of the American Bar Association's Criminal Justice Section, "The Federalization of Criminal Law" (1998) 7

The Federalist No. 45 3

INTEREST OF AMICUS

The Southeastern Legal Foundation, Inc. ("Southeastern") respectfully submits its brief as *amicus curiae* in this case in support of the petition for writ of certiorari to the Second Circuit.[1] The parties have consented to the filing, and their consent letters have been filed with the Clerk of this Court.

Southeastern is a non-profit corporation organized in 1976 for the purpose of advancing public interest viewpoints in adversarial proceedings involving matters of significant public concern. Dedicated to economic and social progress through the equitable administration of law, Southeastern presents the views of its supporters who believe the rights of all persons should be properly protected and balanced in the courts. Towards that end, Southeastern has appeared before this Court on behalf of appellees in *Clinton v. Glavin* decided *sub nom. Department of Commerce v. United States House of Representatives*, ___ U.S. ___, 119 S. Ct. 765 (1999), and has participated as *amicus curiae* in a number of cases before this court, including *Common Cause v. Schmitt*, 455 U.S. 129 (1982); *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742 (1982). Southeastern seeks to promote a limited federal government and proper respect for State functions in our federal system of divided government believing these to represent the surest safeguard of individual liberty.

---

[1] Pursuant to Supreme Court rule 37.6, *amicus curiae* state that no counsel for any party to this dispute authored this brief in whole or in part and no person or entity, other than *amicus curiae*, its members or its counsel made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF THE CASE

Amicus Southeastern adopts the statement of the case contained in the brief of Petitioner.

SUMMARY OF ARGUMENT

The ruling of the Second Circuit in Rita Gluzman's case ignores the limits on Congress's Commerce Clause powers imposed by Our Federalism and intrudes on matters of criminal law and domestic relations that properly belong only to the States. Intercircuit conflicts over the constitutionality of the Violence Against Women Act urge granting of certiorari in Petitioner's case to resolve two issues of recurring significance. The first is the lack of sufficiently clear standards in this Court's decision in *United States v. Lopez*, 514 U.S. 549 (1955), to enable lower courts to afford appropriate judicial review of cases challenging congressional power to criminalize conduct essentially local in character. The second is the continued vitality of *Caminetti v. United States*, 242 U.S. 470 (1917), which is inconsistent with *Lopez* and should be overruled. These steps of clarification and the overruling of *Caminetti* can only come from this Court.

ARGUMENT

I. THIS COURT SHOULD REVIEW THE SECOND CIRCUIT'S RULING IN ORDER TO PROTECT IMPORTANT VALUES OF OUR FEDERALISM

A. The Second Circuit's Ruling Ignores The Limits Imposed On Congress's Commerce Clause Powers By Our Federalism

It is important for this Court to clarify the principles established in *United States v. Lopez*, 514 U.S. 549 (1995)

both to allow their effective application and enforcement by lower federal courts and state courts and to protect the values of Our Federalism. Petitioner's case offers an important, timely, and appropriate opportunity for the Court to undertake that clarification.

Our Federalism is bottomed on a division of authority between the national government and the States as well as among the three branches of the federal government. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) ("Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.") (internal quotation marks omitted); see also, The Federalist No. 45. Justice Black aptly described Our Federalism as

> a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism,' and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of 'Our Federalism.' The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government

> and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, 'Our Federalism,' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.

Younger v. Harris, 401 U.S. 37, 44 (1971).

Our Federalism is most challenged by the modern expansion of congressional power under the Commerce Clause through its use to criminalize conduct essentially local in character and, in many instances, already the subject of local criminal penalties. As this Court warned in *NLRB v. Jones & Laughlin Steel Corp.*, congressional exercises of the commerce power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." 301 U.S. 1, 37 (1937). In *United States v. Lopez*, this Court set standards that would fence off appropriate congressional applications of the Commerce Clause from unconstitutional ones by identifying "three broad categories of activity that Congress may regulate under its commerce

power." *Lopez* at 558. Thus, Congress may (1) "regulate the use of the channels of interstate commerce"; (2) "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) may "regulate those activities having a substantial relation to interstate commerce" or which "substantially affect interstate commerce." *Lopez* at 558-9.

These categories have proven difficult for courts to apply. For example, in Petitioner's case the Government has variously argued that the portion of the Violence Against Women Act of 1994 ("VAWA")(Pub.L. No. 103-322, §§ 40001-40703) under which she was convicted, 18 U.S.C. § 2261(a)(1), can be justified under all three *Lopez* categories. What is apparent from this is that the categories are not clear enough to protect the vital interests of Our Federalism at stake, not only in this case, but under other statutes in which Congress seeks to criminalize conduct which is properly the subject of state law-making. All evidence points to an alarming growth in such federal law-making which threatens Our Federalism.

B. The Nationalization Of Criminal Law Matters More Properly Within State Authority Damages Our Federalism

The recent report of the Task Force on the Federalization of Criminal Law by the American Bar Association's Criminal Justice Section "The Federalization of Criminal

Law" (1998) documents the institutional damage to Federalism wrought by Congress's failure to respect the proper limits of its Commerce Clause authority:

> [1] It . . . undermines the state-federal fabric and disrupts the . . . constitutional balance of federal and state systems. [2] It can have a detrimental impact on the state courts, state prosecutors, attorneys, and state investigating agents who bear the overwhelming share of responsibility for criminal law enforcement. [3] It has the potential to relegate the less glamorous prosecutions to the state system, undermine citizen perception, dissipate citizen power, and diminish citizen power, and diminish citizen confidence in both state and local law enforcement mechanisms. [4] It creates an unhealthy concentration of policing power at the federal level. [5] It can cause an adverse impact on the federal judicial system. [6] It creates inappropriately disparate results for similarly situated defendants, depending on whether their essentially similar conduct is selected for federal or state prosecution. [7] It increases unreviewable federal prosecutorial discretion. [8] It contributes, to some degree, to costly and unneeded consequences for the federal prison system. [9] It accumulates a large body of law that requires continually increasing and unprofitable Congressional attention in monitoring federal criminal statutes and agencies. [10] It diverts Congressional attention from a needed focus on that criminal activity which, in practice, only federal prosecutions can address. [11] Overall, it represents an unwise allocation of scarce resources needed to meet the genuine issues of crime.

Task Force on the Federalization of Criminal Law by the American Bar Association's Criminal Justice Section, "The Federalization of Criminal Law" (1998), p. 50 (hereinafter "ABA Report").

All evidence points to the fact that the trend of inappropriate federalization of crime is "growing, not slowing." ABA Report, p. 11. Indeed, the federalization of crime is undergoing tremendous growth.[2]

C. Only Judicial Clarification Can Empower Lower Federal and State Courts To Effectively Police The Limits Of Our Federalism

The constitutional doctrine of Our Federalism has in the past exerted a restraining influence on Congress, "a principle enunciated by Abraham Lincoln in the nineteenth century, and Dwight Eisenhower in the twentieth century [that] matters that can be adequately handled by states should be left to them, matters that cannot be so handled should be undertaken by the federal government." Chief Justice William H. Rehnquist, The 1998 Year-End Report of the Federal Judiciary.[3] While departures

---

[2] "More that 40% of the federal criminal provisions enacted since the Civil War have been enacted since 1970." ABA Report, p. 7 (Italics omitted). The Report continues: "Much though not all, of this surge has occurred in the last two decades. Even excluding provisions enacted in the last Congress . . . , more than a quarter of the federal criminal provisions enacted since the Civil War have been enacted within a sixteen year period since 1980." ABA Report, p. 7 n. 9.

[3] Also quoted in Remarks of Chief Justice William H. Rehnquist, American Law Institute Annual Meeting, Mayflower Hotel, May 11, 1998. See, http://www.uscourts.gov/ALI.htm.

from this Lincoln-Eisenhower maxim do not reach the level of a constitutional norm, they do illustrate the need for more precise guidance in the application of the *Lopez* rule when Congress strays too far from the implicit limits in our constitutional structure. Guidance from this Court is demanded because of the loss of the maxim's doctrinal constraint and the necessity of substituting review in the courts in light of Congress's abandonment of self-restraint.

The question of whether an activity "substantially affects" interstate commerce such that it may be regulated under the Commerce Clause "is ultimately a judicial rather than a legislative question." See *Lopez*, 514 U.S. 549, 557n. 2 (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 273 (1964) (Black, J., concurring). This judicial task has proven a difficult one for want of clearer principles to aid in the application of *Lopez*.

Problems with the application of *United States v. Lopez* are amply illustrated by the difficulties of the Second Circuit in Petitioner's case. Reasoning that *Lopez* is irrelevant to congressional enactments that regulate either the "channels" or the "instrumentalities" of interstate commerce (as opposed to wholly intrastate activities that "substantially affect" interstate commerce), the Second Circuit ruled that *the mere inclusion of an interstate travel element* in 18 U.S.C § 2261(a)(1) suffices to establish the statute's constitutionality. This over-expansive and misguided reading of *Lopez* is not only erroneous, but also reflects a tendency in several lower court decisions reviewed elsewhere to restrict *Lopez* to its facts. Further review is warranted to clarify the meaning and application of *Lopez* and to define more clearly the limits of

Congress's Commerce Clause authority to federalize crimes normally the proper province of the States.

Lower court judges and academic commentators are divided over the question of whether Congress exceeded its authority under the Commerce Clause in enacting VAWA. Congress's aggressive reliance on the power, particularly in recent years, gives the matter an obvious national importance. Stark differences of opinion and an extensive literature both judicial and non-judicial assure that opposing arguments have been fully developed and strongly suggest that the issue is ripe for this Court's review.

Differences in opinion over the constitutionality of VAWA by other courts also illustrate the need for clearer guidance from this Court. At least three federal judges and one United States Magistrate have concluded that the statute exceeds Congress's authority under the Commerce Clause. In *United States v. Wright*, 965 F. Supp. 1307, 1309-16 (D. Neb.), rev'd, 128 F.3d 1274 (8th Cir. 1997), cert. denied, 118 S. Ct. 1376 (1998), Magistrate Judge Thalken found that 18 U.S.C. § 2262(a)(1), which criminalizes crossing a state line with the intent to violate a protective order (and then violating such an order), exceeds Congress's Commerce Clause authority. The court engaged in a "careful analysis" of *Lopez*, reasoning that Section 2262 "is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise." 965 F. Supp. at 1310, 1315 (quoting *Lopez*, 514 U.S. at 561). The court rejected the government's contention that interstate travel of any kind constituted "interstate commerce," explaining that "[t]here are many ways to cross state lines without moving in the

channels of interstate commerce." *Id.* at 1314. Notably, the court also *expressly disagreed* with the district court's decision in this case. *Id.* at 1311 (explaining that district court in this case had "misconstrued Congress's power to legislate pursuant to the Commerce Clause, as limited by *Lopez*") (footnote omitted). Judge Shanahan subsequently agreed with the magistrate judge's analysis, conclusions, and criticisms of the district court's decision in this case. *Id.* at 1308 & n.1 ("disagree[ing] with the analysis found in *Gluzman*" and explaining that "[a]n interstate movement does not necessarily involve or otherwise have an impact or effect on interstate commerce"). The Eighth Circuit reversed the district court, reasoning that Section 2262(a)(1) "falls within Congress's authority 'to keep the channels of interstate commerce free from immoral and injurious uses.' " 128 F.3d at 1276 (quoting *Caminetti v. United States*, 242 U.S. 470, 491 (1917)). Other courts have similarly rejected Commerce Clause challenges to VAWA. *E.g., United States v. Bailey*, 112 F.3d 758, 765-66 (4th Cir.) (involving 18 U.S.C. § 2261(a)(2)), cert. denied, 118 S. Ct. 240 (1997); *Doe v. Hartz*, 970 F. Supp. 1375, 1409-23 (N.D. Iowa 1997) (42 U.S.C. § 13981), rev'd on other grounds, 134 F.3d 1339 (8th Cir. 1998); *Doe v. Doe*, 929 F. Supp. 608, 612-17 (D. Conn. 1996) (same).

In *Brzonkala v. Virginia Polytechnic Inst.*, 1999 U.S. App. LEXIS 3457, ___ F.3d ___ (4th Cir. 1999) (en banc), the Fourth Circuit held that VAWA's private right of action for gender-motivated violence, 42 U.S.C. § 13981(c), exceeds Congress's authority under the Commerce Clause as well as under § 5 of the Fourteenth Amendment. Judge Luttig's opinion in that case amply canvasses the constitutional issues applicable to VAWA.

The Second Circuit's disposition in Petitioner's case is otherwise and should be heard by this Court and reversed for the reasons set forth by the Fourth Circuit. This intercircuit conflict raises serious disparities in national policy that warrant resolution and clarification by this Court. Also, in *United States v. Page*, 136 F.3d 481 (6th Cir.), vacated and reh'g en banc granted, 143 F.3d 1049 (1998), the Sixth Circuit is weighing whether a related VAWA criminal provision, 18 U.S.C. § 2261(a)(2) (see App., *infra*, 30a-31a), violates the Commerce Clause, along with other issues of statutory construction. There have been other judicial expressions of skepticism about VAWA's constitutionality as well. See *Page*, 136 F.3d at 490 (Wellford, J., concurring) ("[F]or the reasons stated in the *Brzonkala* dissent, the constitutionality of VAWA is subject to serious question."); *Seaton v. Seaton*, 971 F. Supp. 1188, 1190-91, 1193 (E.D. Tenn. 1997) (in "quite reluctantly" upholding VAWA's civil rights provision against Commerce Clause challenge, registering "extreme discomfort with the sweeping nature of VAWA"); *Anisimov v. Lake*, 982 F. Supp. 531, 541 (N.D. Ill. 1997) (acknowledging "substantial ground for difference of opinion" about the proper resolution of the Commerce Clause issue). This pattern of cases reflects on the importance of a resolution of VAWA's constitutionality by this Court which provides adequate guidance for the resolution of future *Lopez* applications which lie ahead.

The *Lopez* standards have proven difficult for lower courts to apply. For example, federal judges have differed sharply over the constitutionality of 18 U.S.C. § 922(o), which makes it a crime to possess or transfer a machine gun that was not lawfully possessed before 1986. The

Fifth Circuit has divided 8-8 over this issue. See *United States v. Kirk*, 70 F.3d 791 (5th Cir. 1995) (2-1), aff'd, 105 F.3d 997 (per curiam) (en banc) (8-8), cert. denied, 118 S. Ct. 47 (1997). Divided panels of the Third and Sixth Circuits have rejected challenges to the statute based on *Lopez*. See *United States v. Rybar*, 103 F.3d 273 (3d Cir. 1996) (Alito, J., dissenting), cert. denied, 118 S. Ct. 46 (1997); *United States v. Beuckelaere*, 91 F.3d 781 (6th Cir. 1996) (Suhrheinrich, J., dissenting). Likewise, judges have also reached divergent conclusions over the constitutionality of the carjacking statute, 18 U.S.C. § 2119. That law has been upheld by divided panels in the Third and Sixth Circuits. See *United States v. McHenry*, 97 F.3d 125 (6th Cir. 1996) (2-1) (Batchelder, J., dissenting), cert. denied, 117 S. Ct. 992 (1997); *United States v. Bishop*, 66 F.3d 569 (3d Cir.) (2-1) (Becker, J., concurring in part and dissenting in part), reh'g en banc denied, 73 F.3d 23, 23-24 (1995) (Becker, Nygard and Roth, JJ., voting to grant rehearing en banc). Similar judicial disagreements have occurred over the constitutionality of other federal criminal statutes. *E.g.*, *United States v. Bailey*, 115 F.3d 1222 (5th Cir. 1997) (willful failure to pay child support for child who resides in a different State) (18 U.S.C. § 228) (2-1) (Smith, J., dissenting), cert. denied, 118 S. Ct. 866 (1998); *United States v. Wall*, 92 F.3d 1444 (6th Cir. 1996) (operation of an illegal gambling business) (18 U.S.C. § 1955) (2-1) (Boggs, J., concurring in part and dissenting in part), cert. denied, 519 U.S. 1059 (1997); *United States v. Wilson*, 73 F.3d 675 (7th Cir. 1995) (Freedom of Access to Clinic Entrances Act) (18 U.S.C. § 248) (2-1) (Coffey, J., dissenting). All of these disagreements reflect divergent readings of *Lopez*.

II. THIS COURT SHOULD OVERRULE *CAMINETTI V. UNITED STATES*

A major factor contributing to the failure of lower courts to adhere to the *Lopez* standards is the notion that interstate travel alone will provide a constitutionally adequate nexus with interstate commerce so to allow for federal criminalization of activities associated with it. This, of course, contradicts *Lopez*: "[T]he proper test requires an analysis of whether the regulated activity *'substantially affects' interstate commerce*." 514 U.S. 549, 559, 115 S. Ct. 1624, 1630 (emphasis added). A contributing factor to the lower court's confusion and tepid enforcement of *Lopez* is this Court's decision in *Caminetti v. United States*, 242 U.S. 470 (1917), which upheld the application of the Mann Act to private, meretricious conduct.[4] *Caminetti* is quoted in *Lopez*, 514 U.S. at 558 for the proposition that Congress's "authority * * * to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to serious question." 242 U.S. at 491. The

---

[4] The Mann Act, now codified as 18 U.S.C. § 2421, made it a crime, among other things, to "knowingly transport or cause to be transported * * * in interstate or foreign commerce * * * any woman or girl for the purpose of prostitution or debauchery, or for any immoral purpose." In *Caminetti*, this Court, by a 5-3 vote, refused to limit the application of the Mann Act to commercial vice and affirmed Caminetti's conviction for transporting a woman with the immoral purpose of making her "his mistress and concubine." The Mann Act had been upheld earlier in a case involving prostitution, a clearly commercial activity facilitated by the interstate transportation of prostitutes. *Id.* at 491-92 (citing *Hoke v. United States*, 227 U.S. 308 (1913).

settled power of Congress under the Commerce Clause to regulate "[t]he *transportation* of *passengers* in interstate commerce." 242 U.S. at 491 (emphasis added) was an important aspect of *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) from which the quotation is drawn. Furthermore, the principle that "Congress may regulate the use of the channels of interstate commerce" is likewise well settled.

The *Caminetti* Court sought to limit its scope by cautioning "that Congress has *no* power to punish one who travels in interstate commerce *merely because he has the intention of committing an illegal or immoral act at the conclusion of the journey.*" *Ibid.* (emphasis added). Experience has shown, however, that this limit cannot be respected and that *Caminetti* has been given a broader interpretation, indeed, one that clearly exceeds the limits required by *Lopez*. 514 U.S. at 564, 566 (stressing that Constitution does not create a "general federal police power"); *id.* at 567 (declaring that while "broad language" in Court's prior opinions "has suggested the possibility of additional expansion, * * * we decline here to proceed any further").[5]

---

[5] Broad applications of *Caminetti* – *e.g.*, *Cleveland v. United States*, 329 U.S. 14, 20-21-22, 28 (1946) (separate opinions of Black, Jackson, Rutledge, and Murphy, JJ.) (involving Mormon polygamists) have been criticized by Members of this Court, and the Justice Department thereafter adopted a policy against prosecution in noncommercial cases unless the victims were minors. See DOJ Manual § 9-79.000 (1997); D. LANGUM, CROSSING OVER THE LINE: LEGISLATING MORALITY AND THE MANN ACT 237-38 (1994). *Caminetti* and the early record of Mann Act enforcement in noncommercial cases have been harshly criticized. D. Langum, *supra*, at 9, 13 (concluding, based on review of Justice

In reaffirming and clarifying the standards of *Lopez* through Petitioner's case, this Court should reconsider whether *Caminetti* retains any contemporary vitality. Illustrating *Heart of Atlanta*'s valid point that "Congress may regulate the use of the channels of interstate commerce" with the quotation from *Caminetti* set out above perpetuates rather than attenuates the dangers of an unconstitutionally broad reading of *Caminetti*. Evidence that *Caminetti* may have outlived its time is demonstrated, for example, by its apparent conflict with the fundamental constitutional right to travel, a right recognized by this Court long after *Caminetti* was decided, see *Shapiro v. Thompson*, 394 U.S. 618 (1969), and one which this Court has continued to value. It is difficult to imagine a reading of *Caminetti* which does not unduly impinge on the fundamental right to travel interstate, especially where states have differing state laws regulating private conduct. It is readily possible for one to travel to another state for purposes which would be illicit in one's home state but allowed in the destination, e.g., *Powell v. State*, 270 Ga. 327, (1998) (unforced, private, non-commercial,

---

Department records, that during the eleven-year period from 1917-28, unelected federal prosecutors conducted "a morals crusade" and using "the Mann Act as a club against blacks who dated white women and defendants who espoused unpopular political beliefs"); Graglia, *United States v. Lopez: Judicial Review Under the Commerce Clause*, 74 Tex. L. Rev. 719, 736 n.108 (1996) (*Caminetti* "illustrates that the conventional citation of *Wickard v. Filburn*, 317 U.S. 111 (1942), as the extreme of federal intrusion into local matter is mistaken" because "*Wickard* at least involved commerce, federal regulation of the national wheat market; *Caminetti* involved illicit romance").

adult sexual activity is allowed by the Georgia Constitution's protection of the right of privacy).[6]

This difficulty is magnified by the contemporary language of the Mann Act which provides (without reference to where a sexual activity may be criminal):

> Whoever knowingly transports any individual in interstate or foreign commerce, or in any Territory or Possession of the United States, with intent that such individual engage in prostitution, *or in any sexual activity for which any person can be charged with a criminal offense*, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C.§ 2421 (italics added).

Overruling *Caminetti* would lay to rest this specter of violation of the fundamental right to travel which emanates from a misuse of the Commerce Clause.

---

[6] *Powell* invalidated O.C.G.A. § 16-6-2(a), a law sustained against federal constitutional attack by this Court in *Bowers v. Hardwick*, 478 U.S. 186, 191-92 (1986) (a right of privacy under the U.S. Constitution did not insulate private sexual conduct between consenting homosexual adults from state proscription).

CONCLUSION

For the reasons stated above, this Court should grant the petition for review of the Second Circuit's decision.

Respectfully submitted,

L. LYNN HOGUE*
General Counsel
VALLE SIMMS DUTCHER
Associate General Counsel
Southeastern Legal
Foundation, Inc.
3340 Peachtree Road, N.E.
Suite 2515
Atlanta, GA 30326
(404) 365-8500

Counsel of Record